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DURKHEIMIAN EPIPHANIES: THE IMPORTANCE OF ENGAGED SOCIAL SCIENCE IN LEGAL STUDIES

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DAVID TRUBEK'S telling¹ of the Law and Society story² is just one version of that story. I agree with much of it, and I think

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1. This article originated as comments to the 1989 Mason Ladd Lecture given by David Trubek at the Florida State University College of Law. Because the published version of the lecture has changed from the oral version, and some of the commentator's earlier comments have been incorporated into the written version that appears in this volume, these written words differ somewhat from my comments at the Symposium event itself on February 24, 1989, but the ideas expressed here remain essentially the same. This is only one forum in which these issues and conversations are being expressed and addressed. See generally Levine, *Goose Bumps and "The Search for Signs of Intelligent Life" in Sociolegal Studies: After Twenty-Five Years*, 24 LAW & SOC'Y REV. 9 (1990) (Presidential Address, 1989 Annual Law & Society Meeting).

I would like to thank Felice Levine for the many conversations over the years that have contributed to the commitment I have to law and social science as described in this article. Thanks also to Robert Meadow, my sometime collaborator in socio-legal research, for critical and helpful comments on this paper. I am also appreciative of the opportunity I had to serve on the Program Committee of the twenty-fifth anniversary meeting of the Law and Society Association, which permitted me to delve a bit into the history of the association. I hope someone will someday write a more complete intellectual history of the forces that produced the association and its early work.

2. Trubek credits his colleague Professor Patricia Williams with "showing [him] how personal narrative can be employed in scholarly argument." Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement* 18 FLA. ST. U.L. REV. 1 n.1 (1990). Without criticizing the "narrative" work in much recent scholarship, particularly among minorities and women (see generally *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (a symposium on narratives)), and while noting that narrative is a form of scholarship I generally enjoy and often employ, we must remember that a personal narrative is still a personal narrative—the story of one teller. Trubek's telling of the Law and Society story through the lens of his own experience must then be taken for what it is—his own personal story. I believe others, particularly those outside of the law school or those of different ages, genders, disciplines, and other social circumstances, might tell different stories. I suggest that the personal narratives of those who are privileged in our worlds of legal knowing (i.e., many white males) have a different tone than those of disempowered people who are trying to be heard (perhaps for the first time). Personal narrative can turn into "telling it like it is" for *everyone*, which may defeat the purposes of some who use the personal narrative form to "correct" or subvert dominant discourses with stories of other experiences. Whether one is situated in the dominant discourse is, of course, relative. To conventional doctrinal legal scholars, all of us in socio-legal studies are outsiders, but within socio-legal studies, Trubek's is one of the "dominant" voices. Many other scholars have recently tried their hand at telling "the law and society story." Their works include Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Macaulay, *Law and the Behavioral Sciences: Is There Any There There*, 6 LAW & POL'Y Q. 149 (1984); Sarat & Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y Q. 97 (1988).

Trubek and I have similar goals with respect to where we think the law and social science relationship should be heading. Nevertheless, we have some different points of emphases and approaches, and our personal experiences with socio-legal studies are different, given who we are. In this Commentary I will focus on some of those differences to push the analysis a bit further and, I hope, to suggest some arenas for further work in an engaged social science of law.

To "join the issues" (in legal parlance), I think that Trubek has overstated the influence of the legal academy on the development of the field of socio-legal research and concomitantly overstated the significance of law in our society. He also has overstated the "power" of the legal profession on the legal academy, understated the political commitments and engagement of law and society work from the beginning, and somewhat simplified the story by "objectifying" and "homogenizing" several different strains of it.³ On the other hand, he has well stated some of the significant epistemological, as well as political, issues confronting our field, and I want to explore those as well. Like Trubek, I am committed to a "critical empiricism," though I would prefer to call it "engaged empiricism." I may be a little less skeptical about certain forms of "positivism," which I would prefer to think of as what we learn from rigorous social scientific studies that reveal the patterns of social life.

In this Commentary I will discuss what law and social science has meant to me. This includes a journey through some of the sociology of knowledge questions raised by Trubek, supplemented by some issues raised by feminist analyses of our epistemology in science generally and, more specifically, law and social science. I also want to explore the relation of socio-legal studies to legal education—not only to scholarship, but also this relation's implications for teaching and learning in the law school and for practicing lawyers.⁴ And finally,

3. This is one of the dangers of narrative. To tell "a" story, a narrator adopts a point of view and narrates. While new forms of fiction have experimented with multi-voiced narrations or narrations that play fast and loose with time and logical sequence, most legal narratives still have a certain "univocality" and logic to them. Trubek's narrative has this element of logical progression from one stage or description of law to another ("Imperial" law, "Realist" law) that may underplay the contentions and complexities inherent in the co-existence of competing visions or understandings of law and legal phenomena. See, for example, the present debates within Critical Legal Studies about the significance of rights and legal advocacy for effecting social change, including Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 HARV. L. REV. 1331 (1988); *Symposium on Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 971 (1987) (Both Crenshaw and authors in the symposium argue that while the struggle for legal rights may be problematic for some critics, law is still an important domain for the minority civil rights struggle.).

4. As a clinical teacher and socio-legal scholar, I have long been urging the exploration of

like Trubek, I want to reflect on where this field is going and the relation of the knowledge produced by socio-legal studies to the politics of law and social change.

I. THE IMPORTANCE OF SOCIO-LEGAL STUDIES: "DURKHEIMIAN EPIPHANIES"

Trubek speaks of the "idea of law and society" as the study of law and legal institutions by the social sciences. This was, in its time, a relatively new idea⁵ because law was seen as the study of doctrine or scientific principles in the Langdellian sense. This view sees law as its own system of knowledge bounded by its own rules and regularities. This view explains, in its own way, how people ought to act—in setting normative principles—and describes how people do in fact act—in setting standards such as the "reasonable man" (sic)⁶ in negligence law. The teachings of legal realism, and subsequently law and society, have to do with recognizing the embeddedness of law in social institutions and social life and the variability of human legal behavior. Law is not a system unto itself. The desire that we should be a nation "of laws and not men" is an aspiration that—ideally—uniform abstract principles—rather than arbitrary human will—should govern all of us. Adherence to the law varies,⁷ however, and the meaning of the law varies.⁸ Additionally, participation in law making, law breaking, law

the connections between empirical research and "practical" knowing in legal institutions and law practice. See generally Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980); Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287 (1986) [hereinafter *Dilemmas*]. My interest flows from an old tradition in the pragmatism and educational theories of John Dewey. For a good example of his work, see J. DEWEY, *EXPERIENCE & EDUCATION* (1938). This tradition, in my view, is now best represented in the works of Donald A. Schon. See generally D. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987) [hereinafter *EDUCATING*]; D. SCHON, *THE REFLECTIVE PRACTITIONER* (1983).

5. This scholarly approach was not a completely new idea, as Trubek recounts, because of the work in the founding of legal realism. Consider the work in this area by Roscoe Pound in Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). Political scientists would argue they have been doing socio-legal research since their beginning, particularly those in the public law field.

6. Recent feminist critiques of this "male" standard of the law include Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435 (1981).

7. These are exemplified in the "gap" studies. See generally Abel, *Law Books and Books About Law* (Book Review), 26 STAN. L. REV. 175 (1973); Trubek, *supra* note 2, at 8 n.16.

8. For an example of this observation in the area of deconstructive legal scholarship, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). For examples in the growing area of law and literature studies, see R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); R. WEISBERG, *THE FAILURE OF THE WORD* (1984); J.

enforcement, and legal institutions varies. We undertake the study of law *by or through* social science to understand *why* these things vary. Additionally, we want to uncover, where possible, the meanings and explanations for the patterns of human behavior within legal institutions and outside of legal institutions as structured by the interaction of legal rules and institutions on the one hand and human actors on the other.

Thus, as a social science-trained undergraduate embarking on law study, I was constantly surprised to see how often empirical statements served as the basis or justification for legal rulings, or for predictions about human behavior and compliance with the law, and how seldom such claims were substantiated by rigorous empirical study. How seldom did law seem to be informed by what, as a sociology student, I had labeled a "Durkheimian epiphany"—a manifestation of an almost "divine" ordering of things by human social patterns. I imagine the moment of insight when Emile Durkheim, poring over statistics in his study of suicide,⁹ recognized the "social facts" of the occurrence of suicide—patterns that were clear and in some cases quite counterintuitive. Suicide rates were higher for single men than married men and lower for single women than married women,¹⁰ allowing Durkheim, in seeking explanation, to tell a tale of the gendered nature of the family experience that is remarkably robust to this day. He interpreted this data to suggest that the needs of men were better served and satisfied within the family, with a wife to support and care for such needs, while women were more likely to feel oppressed and depressed within the burdens of family life.¹¹ Thus, in the words of Berger and Luckmann, Durkheim's observations built on both "objective facticity" and "subjective meaning."¹² The story told was one of social explanation derived from numbers. Indeed, as sociologist Randall Collins points out, to illustrate the importance of exploring the relationship of explanation to data in modern sociology, even

WHITE, WHEN WORDS LOSE THEIR MEANING (1984); West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); West, *Law & Literature, and the Celebration of Authority* (Book Review), 83 NW. U.L. REV. 977 (1989).

9. E. DURKHEIM, *SUICIDE* (1951).

10. *Id.* at 171-202 (see especially pages 188-89). The analysis of variations in suicide rates is actually quite sophisticated, describing the operations of a variety of differences in rates having to do with families with children and those without. Durkheim tells a story of variation within the conjugal family (husband-wife) and family groups (with children) and also traces variations by class and region.

11. *Id.*

12. P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE* 18 (1966).

"mathematics is always embedded in words,"¹³ providing what can be called a "discursive positivism."

In the years since scholars first began trying to understand the variables that affect "legal behavior," similar "social facts" have been uncovered in some areas of socio-legal inquiry. While lawyers assumed (or at least acted on the assumption) that if they legislated or litigated, the rest of the world would follow, social scientists looking at legal phenomena uncovered the variability, contextuality, and complexity of expressions and behavioral manifestations of the law. In my view, the name "legal realist" is apt because the realists were more realistic about the causality and determinacy of law; they were slightly more skeptical about law, or at least they understood that other social relations would mediate the effects of rules and commands. Thus, from my own experience, I found the moments of Durkheimian or sociological "epiphanies"¹⁴ in the law more interesting and more true to experience than the arid claims of legal doctrine alone. After all, *Brown v. Board of Education*¹⁵ had been decided, but the schools were not integrated, so clearly the law was not simply followed.¹⁶ The effort to understand why and when law is followed and when it is not could be termed an instrumental project of the liberal legalists, as described by Trubek. For those who thought that law could effect social and political change, it was important to understand when it did and under what circumstances, and when it did not. Thus, from the beginning and from my perspective (a whole generation later in law and society terms¹⁷), the social study of legal phenomena was, in Trubek's terms, "critical empiricism" and in mine, "engaged research," in that the research was committed to particular social and political goals, even if also committed to conventional positivist social science methods.

Law is a human artifact. It is made by some people, enforced by other people, as it acts upon yet other people.¹⁸ Thus, attempts to un-

13. Collins, *Sociology: Proscience or Antiscience?*, 54 AM. SOC. REV. 124, 128 (1989).

14. It may seem somewhat ironic to use a religious term to describe an experience of "scientific knowledge," but for us twentieth-century non-believers or agnostics, knowledge revealed can be as dramatic as a moment of spiritual enlightenment.

15. 347 U.S. 483 (1954) (holding that separate but equal education for blacks and whites is unconstitutional).

16. As "gap" studies explored the gaps between the law on the books and the law in action, another area of research in socio-legal studies became known as "impact" studies, tracing the impact Supreme Court decisions in particular have or do not have on the behaviors they are supposed to affect. See generally *THE IMPACT OF SUPREME COURT DECISIONS* (T. Becker ed. 1968).

17. In "real" years this is not very long. I attended my first Law & Society meeting in the late 1970's.

18. Actually, as many legal feminists have argued, for most of human history law has been

derstand why laws turn out to be the way they are, when they are obeyed and when not, and in which particular periods of time and in what places, became a behavioral social science, but one that was committed to particular legal and social questions. As Trubek notes, an analysis of the first five years' issues of the *Law and Society Review* reveals that most of the articles were committed to the law and social change projects of the 1960's: civil rights and civil liberties, Warren Court decisions, and Great Society programs involving welfare law, urban renewal, and legal services for the poor. Other issues of liberal legal reform also were covered, such as the insanity defense and child custody; also evidenced were efforts to spread information about socio-legal research and its scientific methods.¹⁹ So, from the beginning, efforts to understand the social construction of legal issues and the ways in which the new rules of the 1960's were or were not affecting social problems was a large part of the early socio-legal research agenda. Although Trubek may label these as "liberal legalisms" through the lens of 1990's politics, in the 1960's these legal and social reform projects (particularly in the War on Poverty) were serious political efforts to bring about social change. Socio-legal research was one of the arms of a larger social movement.²⁰ The current vogue of critiquing law and society research as "policy science"²¹ enfolds the cynicism that social reformers now feel about government policies and programs into the historical telling. This engrafts a 1980's cynicism and skepticism onto the efforts of the 1960's, when there was hope in the land that government policies and programs might be effective,

made and enforced by men, yet has acted on men and women. See generally Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Rifkin, *Toward A Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980). Similarly, critical race theorists have focused on how laws created by white people have been used to define the legal existence of non-white peoples. See generally Crenshaw, *supra* note 3.

19. Trubek, *supra* note 2, at 38 n.76.

20. In one of his earlier pieces in this series, Trubek seems a bit more willing to describe the early years of Law and Society as a political project, albeit one that failed, largely because the government policies "failed." Trubek & Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW AND SOC. INQUIRY 3 (1989). Without belaboring the analogy, one can see that many of our modern social movements have a parallel development in academe. Women's studies in the universities is an outgrowth of the social movement of feminism. See generally E. DuBois, G. Kelly, E. Kennedy, C. Korsmeyer & L. Robinson, *FEMINIST SCHOLARSHIP: KINDLING IN THE GROVES OF ACADEME* (1985). Critical Legal Studies is the academic arm of the radical left of the 1960's and 1970's, and critical race scholars can trace their origins to the civil rights movement. From my own personal history, I would add the connections of clinical legal education to the anti-poverty legal services movement of the 1960's and 1970's as well. This is not to say that all academic "schools" of thought can find analogues in social movements, but the more progressive ones certainly can.

21. See Trubek & Esser, *supra* note 20, at 16; see generally Sarat & Silbey, *supra* note 2.

and when social science was one of many instruments for affecting the system, if not for measuring the effects of other forces of social and legal change.

A brief look at some other examples of "Durkheimian epiphanies" in socio-legal research may illustrate the significance of those moments of understanding the patterns of legal behavior, patterns that illustrate how law operates and how law can and cannot be used to effectuate change. As discussed by others before me,²² *The American Jury*²³ was significant not only because it was one of the first efforts to systematically apply social science techniques to the study of legal institutions, but because of the substantive findings relating to the extent of agreement and disagreement between judge and jury verdicts. This work represents the culmination of many "Durkheimian epiphanies." These discoveries continue to shape our thinking about fact finding, small group behavior, and important policy questions—such as the competency of lay jurors in cases requiring technical expertise. This study (actually a series of studies) began what is now a major area of research—jury behavior²⁴—that continues to influence policy and practical decisions made by lawyers in particular cases.²⁵ Indeed, *The American Jury* study may be one that is particularly ripe for replication in the near future. Its applicability to present times in a multicultural environment, where crime and big business scams appear to be on the rise, could be tested. The study's comparisons between civil and criminal trials could be elaborated, different methods could be used, and variations on the fact finding process—such as the summary jury trial²⁶—could be tested. From this study we have learned, among other things, that the social location of fact-finders in the legal system might influence the judgments they make: Do judges who hear hundreds of criminal trials have different assumptions about guilt than those who are new players in the system and are schooled in the "presumption of innocence"? *The American Jury* study also poses questions of social science interpretation that have great relevance to us today. For example, at what point do divergences between judges and juries matter? Is a ten percent divergence of opinion a concern suffi-

22. See generally Levine, *supra* note 1.

23. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

24. See generally V. HANS & N. VIDMAR, *JUDGING THE JURY* (1986).

25. My own experience with *THE AMERICAN JURY*, *supra* note 23, was both scholarly, as a new socio-legal scholar and student, and practical. I read it at a time when I was making my first decision as a lawyer about whether to demand a jury in a criminal matter.

26. Lambros, *The Summary Jury Trial and Other Alternative Means of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).

cient to affect constitutional decision-making about juries, or is a ninety percent overlap of fact-finding so similar that we can dispense with juries? Such findings in turn present us with important issues about how to make such judgments: to what standards of "proof" should we hold ourselves, and how do we integrate the different "evidentiary requirements" of different disciplines? Should constitutional decisions about the "right to a jury trial" turn on social science correlations of convergence in judge-jury fact-finding? Can legal decision-making incorporate more equivocal social science findings than the "certainty" or "preponderance of the evidence" required by legal standards?

Other "Durkheimian epiphanies" in law have revealed more complex social patterning. From the important death penalty research conducted by David Baldus and his collaborators,²⁷ we have learned that "simple" race discrimination does not determine the meting out of capital punishment, but rather a more complicated relationship between the race of the victim and the race of the defendant has an impact on death penalty decisions.

Significant social scientific study of the legal profession has confirmed what many of us know from experience—that the practice of law is highly stratified and segmented; it can hardly be considered a unitary profession.²⁸ We have also learned that the practices of lawyers, including ethical decisions and the principles lawyers use to resolve moral dilemmas, will vary depending on their social location.²⁹ Popular images of the lawyer reflect this complex and changing socio-

27. See generally Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Baldus, Pulaski, Woodworth, & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984). Unfortunately, the Supreme Court did not find this work sufficiently persuasive to affect its ruling, temporarily closing another chapter in the impact of social science on law-making story. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding that a study that the death penalty in Georgia was imposed more often on black defendants and killers of white victims failed to show a discriminatory purpose in this case and did not indicate a constitutionally significant risk of racial bias). See generally W. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* (1984).

28. R. ABEL, *AMERICAN LAWYERS* (1989); J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); Ladinsky, *Careers of Lawyers, Law Practice, and Legal Institutions*, 28 AM. SOC. REV. 47 (1963); Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. LEGAL EDUC. 127 (1963).

29. See generally J. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962); J. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* (1967); Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985).

logical reality. If the idealized normative lawyer was the fatherly small town solo practitioner in the nineteenth century, he was replaced in turn by the gentlemanly but rapacious railroad lawyer of the late nineteenth century, the elite corporate lawyer of the early twentieth century, the crusading individual rights litigator and orator, the steely government lawyer, and now the marauding "M and A" lawyer.³⁰

Through my recent work on women in the legal profession, I have experienced my own "Durkheimian epiphany." In examining data on the participation of women in the legal profession in twenty nations (mostly the modern western democracies, with some representation from Latin America and Asia), I found that women were performing all lawyering tasks when these tasks, throughout the nations, were aggregated. But if one looked at particular countries or particular legal cultures, women were uniformly over-represented among the lower paid and less prestigious areas of practice, however a particular country or legal culture valued legal work. Thus, in countries where litigation is highly valued, women are office functionaries; in countries (like ours) where corporate deal-making has reached the top of the money and prestige scales, women are more likely to be litigators. And in virtually all nations, women are more likely to be found in the public sector, where civil service rules are more likely to reflect anti-

30. "M" and "A" refer, respectively, to mergers and acquisitions. See generally Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL WAR AMERICA* 51 (G. Gawalt ed. 1984); Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281. Each of these images of lawyers has parallel descriptions in the empirical work on lawyers and in popular culture treatments of lawyers in film, novels, and television. Contrast the most recent glossy television images of the private firm lawyers of *L.A. Law* with the true grit of the prosecutors of *Equal Justice*. I cannot resist pointing out that 1990's popular culture seems to be glamorizing "the other side" of lawyers—private, corporate lawyers in big firms and prosecutors—while earlier (1960's) images were more likely to be of the independent "crusading" Clarence Darrow, Atticus Finch types, such as *Perry Mason* and *The Defenders*. Change in the "center" of empirical inquiry parallels this shift. People who formerly studied legal services lawyers and other "underdog" lawyers have now flocked to the study of the big firm lawyer. See generally Symposium: *The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education*, 64 IND. L.J. 423 (1989) (including Friedman, Gordon, Pirie & Whately, *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555 (1989); Garth, *Legal Education and Large Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433 (1989)); the recent work of Marc Galanter, for example Galanter & Palay, *The Transformation of the Large Law Firm* (a paper delivered to the American Bar Foundation Conference on Professionalism, Ethics, and Economic Change (September 1988)) (preliminary version on file at Florida State Archives). Have both the popular media and scholars been captured by the same "political" and cultural forces of 1980's Reaganism?

Here is one site where socio-legal study demands the kind of critical judgment it receives from Trubek. He and I are most in agreement about wanting socio-legal scholars to bear some self-consciousness and responsibility for the sites and effects of their work.

discriminatory norms.³¹ Thus, the "Durkheimian epiphany" of the social patterning of occupational segregation illustrates the interactions of law and society and the women actors who have tried to move from one sphere to another. Yet, these "social facts" are even more interesting because the discovered patterns also enable us to see that one way we can measure the relative desirability of a particular legal occupation is simply to look at where the women are.³² The result is that we have uncovered one social pattern to watch—to see if it changes; at the same time, we may have uncovered another "variable" to use to decode other social phenomena, such as what constitutes less valued work. Thus, empirical work on the legal profession describes a far more complex world in which *who* practices law may be as significant as *what law* is practiced. This attention to who the legal actors are, in an empirical rather than doctrinal sense, describes the operation of the legal system in a far more accurate way than simple studies of what the law is could ever do.

Other examples of the social patterning of legal behavior abound. Indeed, many of them come from Trubek's own colleagues. Stewart Macaulay's important empirical works demonstrated that businessmen resorted less often to law than to relationship in resolving contract disputes,³³ and that lawyers also failed to use law in resolving consumer disputes, in part because they were ignorant of the law and in part because they preferred less adversarial methods of resolving "small" disputes.³⁴ Marc Galanter's now classic work³⁵ reported that "repeat players" in the legal system were likely to fare better because of their experience with the system and because of the greater resources available for mobilization among the "haves" of our society.³⁶ As legal scholars and actors, we have learned important lessons from this work: Who is legally "right" may not matter as much as who is not only "street smart" in Trubek's words, but also "court-smart." The significance of these studies, even if underappreciated by

31. Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 196 (R. Abel & P. Lewis eds. 1989); Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 *LAW & SOC. INQUIRY* 289 (1989) [hereinafter *Research Agenda*].

32. Much, though not all, of what is said here about women also applies to other "excluded" groups. See generally Menkel-Meadow, *supra* note 18.

33. Macaulay, *Non-contractual Relations in Business*, 28 *AM. SOC. REV.* 55, 58 (1963).

34. See generally Macaulay, *Lawyers and Consumer Protection Laws*, 14 *LAW & SOC'Y REV.* 115 (1979).

35. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

36. *Id.*

traditional legal scholars, is not lost on practicing lawyers, who share a sort of "empirical"³⁷ understanding of how legal rules actually operate, as mediated by the actors and institutions that enact the rules and practices of the law.

Similarly, in the criminal context, Malcolm Feeley's empirical work³⁸ in the lower courts demonstrates that the processing of cases itself is experienced as "punishment"—rather than the expression of our higher values of due process—to those who experience it.³⁹ And in a recent controversial book,⁴⁰ legal sociologist Jack Katz has argued that crimes are committed for the emotional highs and thrills they give the perpetrators,⁴¹ thus posing a challenge to much of our legal policy in crime prevention and punishment.

These examples are only a few of the many I could give of how social patterning, revealed by rigorous empirical research and creative interpretation, demonstrates the problematic aspects of the operation of law and legal institutions. I do not wish to make an argument here for crass positivism, but I fear the critique of the politics of positivism, a critique which I share with Trubek, may cut too broad a swath through the thicket of what empirical research has told us about law. Below, I will explore my commonalities with Trubek's insistence that we look at the sources of our questions and research designs, consider the possible effects of our research, and claim some responsibility for the research that is conducted under the name of socio-legal studies. At this point, however, I want to be sure we do not go too far. Moments of seeing patterned social facts or "Durkheimian epiphanies" are significant in our understanding of how the legal system operates; we cannot abandon research that seeks to realize more of these moments.

Recognizing that virtually all of the works discussed above reveal a "critical empiricism" (with a small "c," if not a capital "C") is also important. Research questions are framed and data pursued because the researcher is critical of the received wisdom or common conceptions of the field and its issues. The studies I have sought to highlight do not "document the obvious" or "demonstrate that common sense is true," often-heard derogatory statements about what social science

37. Here I use empirical in the "experiential" sense of the term. For further elaboration of the definitional issues implicated in the differences between empirical method and empiricism as a philosophy of knowledge, see *Interpretation in Sociolegal Research: A Review Section Debate*, 15 *LAW & SOC. INQUIRY* 135 (1990).

38. M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

39. *Id.*

40. See generally J. KATZ, *THE SEDUCTIONS OF CRIME* (1988).

41. *Id.*

does. These studies criticize what we may think is true by showing us that our understandings are too simplistic or that there are "underlying" forces beneath the obvious social patterning that explain more, or cause us to question our "common understandings."⁴² In this sense, "Durkheimian epiphanies" are "Critical empiricism" (Critical with a capital "C") when they challenge what we already know—the politics may not always lead in one direction.⁴³ And here my major point is that we must be careful about going "Back to the Future" when what that leads to is 1990's interpretations of 1960's scholarship and events that had different meanings—including their political ones—at the time. An historian must always interpret the past from his or her present perspective, but a good historian also must take heed of the context in which the past was enacted.

II. SOCIO-LEGAL STUDIES BEYOND "DURKHEIMIAN EPIPHANIES:" OF "TRANSDISCIPLINARY" KNOWLEDGE

Socio-legal studies is important not only because it reveals the particular social patterns of legally structured behavior. On the levels of method, object of study, and theory, socio-legal studies also has independent significance because of what it asks us to look at and how we study the material. Socio-legal studies has taught those interested in law to look at "texts" other than statutes or cases.⁴⁴ Social science work about the operation of law exposed the interaction of law and those it acts upon in the lower courts,⁴⁵ rather than only exposing the doctrine of the Supreme Court; it exposed too the operation of law in

42. Indeed, one of the most interesting and robust areas of sociological inquiry is the study of the patterns of everyday life. These studies help us understand how what we take for granted came to be part of the "given" and unquestioned nature of things. They also complicate the easy acceptance of some of these "common understandings." See the discussion of the contributions of ethnomethodology in D. SMITH, *THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY* (1987) and in Collins, *supra* note 13.

43. Let there be no mistake about it, this is not a statement critical of Critical Legal Studies, of which I am a card-carrying member. I merely wish to broaden the sense in which socio-legal studies may be critical without necessarily being politically left. I see Jack Katz' work on criminality, *supra* note 40, as an example of this kind of work. His work has inspired reaction from those on both the left and the right, exemplified by an *Author Meets the Critics* discussion at the Law and Society Annual Meeting in June, 1989. There also has been room for small "c" criticism within Critical Legal Studies, of which Trubek's own *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984), is one of the best examples. In one sense, Critical Legal Studies could be faulted for "documenting the obvious." Try asking any person on the street whom the law protects and one is likely to get an answer close to "the rich" or "the powerful." The person on the street already knows what critical scholars are trying to prove to the rest of legal academe.

44. For a fuller and more eloquent discussion of how law has turned outward to meet other disciplines, see Minow, *Law Turning Outward*, 73 TELOS 79 (1987).

45. See, e.g., M. FEELEY, *supra* note 38.

other settings, such as the law office,⁴⁶ the clerk's office,⁴⁷ and the streets,⁴⁸ as it often turned the focus on other actors—clerks, lawyers, police, mediators—rather than simply on judges or legislators. Thus, socio-legal studies takes us out of the law books, particularly the appellate law books, and into those places where law is actually experienced.

Socio-legal studies is not alone in telling us that the action is not in the law books. If a thorough intellectual history of socio-legal studies is to be done, it must examine the connections of the "law and society" idea to the other "law and . . ." ideas with which it coexists. I will only sketch those here, but as someone who considers herself a "multiple marginal" by working in a number of these areas, I do want to address some of the common themes that unite those who seek to explain legal phenomena by other than self-referential legal "science." The most significant legal movements that challenge legal doctrine include law and literary analysis (somewhat different from the study of law and literature itself),⁴⁹ Critical Legal Studies, clinical legal education, law and humanism, feminist legal studies, and law and economics.⁵⁰

Although in one sense law and literary analysis shares the most common frameworks with traditional legal analysis—in that it focuses on the text as subject and employs not dissimilar methods of interpretation⁵¹—literary analysis does suggest that there are meanings

46. See generally Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. L. 331 (1979); Sarat & Felstiner, *Legal Realism in Lawyer-Client Communications*, AMERICAN BAR FOUNDATION WORKING PAPER # 8723 (1989).

47. Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409 (1988); See generally Merry, *Everyday Understandings of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253 (1986).

48. See generally Katz, *supra* note 40.

49. Contrast R. POSNER, *supra* note 8, R. WEISBERG, *supra* note 8, and West, *supra* note 8, with Dalton, *supra* note 8, and Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (Dalton and Frug use literary methods to critique legal texts, as contrasted with studies of the use of law in literary texts.).

50. There are others (see AALS list of Sections, including law and community, law and medicine, law and science), but the ones in the text all share a direct challenge to both the teaching and method of doctrinal analysis.

51. I was struck as a beginning law student by the similarities between reading a case and reading a poem by one of the modernists like Ezra Pound or T.S. Eliot. The words were filled with layers of meaning and conjured up allusions to past worlds and symbols that needed both simple definition and translation (there was much Latin in both), as well as a good background in history. More recently, the schools of deconstruction and structuralism have been used to help in both the decoding and encoding of texts. The difference between poetry and law cases was that law cases began to resemble each other after awhile, while poems contained more of the artistry of individual poets and more of the beauty of the variety of life. See sources in note 49,

embedded in the text that must be teased out. It also suggests that the text bears a relationship to the context in which it is read and to the person who reads it, that moves us outside of the text to the writers and readers of the cases. Most important for my purposes, literary analysis (not legal analysis) reminds us that words need interpretation and that they are not self-executing and "real" in the sense that Langdellian legal "science" would see them as "rules" of human behavior. To the extent that law creates several genres in the forms of cases, statutes, administrative regulations, and opinions,⁵² literary analysis may help us less with the "collective" form of writing done by legislatures and agencies, but it does remind us not to take doctrine as dogma, thus moving us away from "classical" treatments of legal texts.⁵³

Others, including Trubek and myself, see the law and economics movement as having the closest affinity to traditional legal "science." The movement seeks to substitute another body of scientific rules and normative principles (like efficiency) for the failure of legal principles to easily predict behavior and guide decisions. In my view, law and economics has gained greater acceptance in legal scholarship and practice not necessarily because its rules are any better at predicting behavior, but because there is more normative agreement among scholars and practitioners than exists in many other "law and" fields.⁵⁴ It is also no accident that, to the extent that each of these schools of thought is based in a "critical" ideology (I am arguing that they all are), law and economics has gained relative ascendancy at a time when its market ideology is reflected in both national politics and policy. Nevertheless, I still see the law and economics movement as an intellectual discipline that shares some affinities with the other schools—it does challenge and reveal the indeterminacy of doctrine in much the same way as Critical Legal Studies does (if from the other side of the

supra, for some of the debates in literary analysis of texts involving law; for a sense of the flavor of the literary interpretation debate in law, see, for example, Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984), and *Symposium: Interpretation*, 58 S. CAL. L. REV. 1 (1985). For an amusing and delightful satire of the various schools of literary criticism (and the silliness of academic life in general), see the fictional work of David Lodge, especially D. LODGE, *NICE WORK: A NOVEL* (1989) and D. LODGE, *SMALL WORLD* (1984).

52. And like literary analysis, legal analysis privileges some texts over others. We look at legislative history in committee reports to determine legislative "intent," but we do not analyze drafts of opinions to study the "intent" and political interplay of judges writing common law.

53. Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW & SOCIOLOGY 3 (R. Simon ed. 1980); Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

54. Of course, it certainly helps to have the scholars become the practitioners, such as when former Professors Scalia, Posner, and Easterbrook, among others, became judges. See generally R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

political spectrum). It also sees human (if too rational for my taste) actors in the legal system whose behavior must be explained (and can be changed with the proper incentives—usually with payments or appeals to efficiency). Additionally, some of the best work uses empirical methods to study the behavior of allegedly “rational” decision-makers to explore how far the real is from the ideal.⁵⁵ In theory, law and economics may seem to promise the “certainty” of doctrines that legal rules cannot deliver, but in fact much law and economics work demonstrates just how far we are from having determinate systems of rules that explain actual behavior.

In my view, also expressed in Trubek’s earlier work,⁵⁶ much of the work of Critical Legal Studies looks most like traditional legal scholarship in its focus on the legal text—rules and cases. Many writers have challenged critical legal scholars to broaden their work to empirical study.⁵⁷ Yet the purpose of critical textual analysis is not to uncover the “scientific” universals expressed in the abstractions of legal rules, but rather to demonstrate just how much a human artifact law really is, and to develop and “prove” the claim that underlying power relations structure the texts and their reading.⁵⁸ At the level of intellectual method, Critical Legal Studies has shown about law (what we actually began to know from the Legal Realists) what Terry Eagleton has said about literary theory (and which, in my mind, holds true for all theory):

For any body of theory concerned with human meaning, value, language, feeling and experience will inevitably engage with broader, deeper beliefs about the nature of human individuals and societies, problems of power and sexuality, interpretations of past history, versions of the present and hopes for the future. It is not a matter of regretting that this is so—of blaming [literary] (legal) theory for being caught up with such questions. . . . Such pure . . . theory is an academic myth [T]heories are not to be upbraided for being political, but for being on the whole covertly or unconsciously so—for the blindness with which they offer as a supposedly “technical,” “self-evident,” “scientific” or “universal” truth doctrines which with a little reflection can be seen to relate to and reinforce the

55. See generally Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

56. See Trubek, *supra* note 43, at 577.

57. See generally Munger & Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL’Y Q. 257 (1984).

58. I will not cite all of the voluminous CLS literature here. For a good review, see M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

particular interests of particular groups of people at particular times.⁵⁹

Thus, without an empirical focus, Critical Legal Studies shares the project of demonstrating the human interests (the power relations) of those making law for their own purposes and thereby exposes the myth of "scientific truth" in law.

In its brief and hardly noticed expression in some law schools, the law and humanistic education movement⁶⁰ sought to express the human dimensions of law, lawyering, and learning by focusing on the psychological and interpersonal dynamics of the expression of legal principles and practice of law. Although he would not be considered a member of this group, the work of John Noonan, in his book *Persons and Masks of the Law*,⁶¹ represents one example of looking at the effects of lawmaking on the people involved in cases. In his treatment of the famous Palsgraf case,⁶² Noonan explores the plight of Mrs. Helen Palsgraf and the emotional and monetary costs of her injury, as contrasted with Justice Cardozo's pursuit of his own political, economic, and legal theory interests in crafting his famous words about proximate causation. In combination with the contributions of clinical education, such efforts to make real the human dimensions of law and law practice are attempts to convey the empirical reality of law—in both theory and learning—with appreciation for the individual's experience of law and legal institutions.⁶³

If law is learned through legal doctrine, then practice, where it is taught at all, is taught through experience. Thus, the clinical education movement has sought explicitly to bring the real world into the law school and, in the words of Trubek—in another context—become the "facts" department of the law school. I will say more about this below when I explore the connections of socio-legal studies to legal education. Here it is important to note that the focus of socio-legal studies and clinical education is the same—to understand the legal world that *is*—even if the knowledge will be put to different uses. The

59. T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 195 (1983).

60. See generally E. DVORKIN, J. HIMMELSTEIN & H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981); Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U.L. REV. 514 (1978).

61. J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976).

62. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

63. The new law school at CUNY-Queens was founded to express these concerns in an innovative curriculum seeking to combine doctrinal, theoretical, and experiential learning for "law in the service of human needs." Catalogue of City University of New York Law School at Queens College 9 (1986-87).

production of knowledge in legal clinics can be likened to a social science "laboratory" where researchers and practitioners tease out exactly those "gaps" in the law on the books and in the law as practiced that must be understood to function in the legal system. Elsewhere, I have lamented that no closer connection exists between the research of socio-legal studies and the practice of law in academic clinical settings⁶⁴ that could lead to the kind of "engaged" practice and social research I discuss below. Nevertheless, clinical education and socio-legal studies share moments of "Durkheimian epiphanies" when they reveal patterned moments of social truth in the ways that legally "controlled" behavior diverges from the "given" rules.⁶⁵

I use legal feminism as another school of thought (there are others, such as critical race theory) that challenges the focus on the legal system as a universal, abstract, objective, and neutral construct created by particular actors. Some versions of feminist jurisprudence have expressed the broadest possible attack in describing the legal system as an institution given to maintaining patriarchy, with little possibility of expressing a legitimate order for us all.⁶⁶ In other claims, feminists have argued that the law and its principal interpreters and actors do not take account of women's experiences, and thus the formality of the law does not reflect the reality of women's lives and is, therefore, illegitimate and insufficiently helpful to women.⁶⁷ Again, I do not have space here to explore the richness of feminist scholarship, but I do want to explore two aspects of feminist thinking that have implications for our current subject. First, by focusing on a previously excluded group—women—legal feminism exposes the lack of truth in the "neutral," "formal," and "objective" pronouncements of law. Thus, in common with other movements, legal feminism tells us that

64. *Dilemmas*, *supra* note 4, at 296. For a persuasive argument that clinical education also develops theories about lawyering, see Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

65. In a recent class that I taught on mediation, a mediator from the local family court described the processes used in her court. Students were amazed to learn how much the described "practice" diverged from what the statutes seemed to require. They could not really grasp that a lack of resources restricted the ability of most clients to protest through formal legal appeals. Such descriptions of how the law really operates in a clinical setting are much better understood from the writings of rigorous socio-legal scholars than from any formal legal statutory scheme. See generally Galanter, *supra* note 35; Greatbatch & Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989); Silbey & Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986).

66. Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

67. C. SMART, *FEMINISM AND THE POWER OF LAW* (1989); Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751 (1989) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987)); Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. L. F. 23.

formal law cannot create its own hermetically sealed and complete system of explanation. Law may not "cause" gender oppression,⁶⁸ but its rules do not act neutrally on all human beings. To understand its differential operation on women, we cannot simply look at the legal text⁶⁹ but must instead understand the social forces that undergird the legal treatment of women. Secondly, the very exclusion of women has led to a spate of scholarship and speculation about how both the substance and methods of inquiry of the study of law might be refigured with new researchers and actors in the system.⁷⁰ I explore these epistemological issues in the next section.

What all of these intellectual movements share is a desire to have "Durkheimian epiphanies" that are deeper and richer than a formalist understanding that comes from arid analysis of legal doctrine and to thereby create "transdisciplinary" knowledge about legal phenomena. By transdisciplinary I mean more than the simple borrowing of methods or insights from another field to supplement our legal understandings of law. Transdisciplinary work moves through the work of many disciplines to achieve knowledge about a subject (like law) that is deeply textured, rich in description and explanatory power, and "beyond" the claims of any one discipline.⁷¹ In part, this work comes from the critical attention paid to the deconstruction of both the law part and the society part of socio-legal studies. Like Trubek, I think that good critical socio-legal research and teaching must continue to treat the boundaries of both law and society and their influences on each other as problematic⁷² and continue to use the theories and methods of each discipline to "correct" and supplement the structured errors or blindnesses that accompany any univocal description of social phenomena.

68. Many think it does, *see, e.g.*, Rifkin, *supra* note 66, at 84, and others think it certainly facilitates gender oppression, *see, e.g.*, C. MACKINNON, *FEMINISM UNMODIFIED* (1987).

69. Although the legal texts of *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that differential treatment on the basis of pregnancy is not sex discrimination), may be text enough!

70. *See generally* Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Menkel-Meadow, *supra* note 18; *Research Agenda*, *supra* note 31.

71. In this sense, transdisciplinary is synthetic in a way that "cross" or "inter" disciplinary work seldom is (one discipline usually still dominates in these two forms). This is one of the critiques Trubek makes when he says law has been dominant in socio-legal studies. Another version of the "transdisciplinary" story is to see the development of a whole new field. This I take to be Felice Levine's approach to socio-legal studies. *See supra* note 1. The issue of what constitutes a "field" is one that affects a number of new disciplines trying to use the methods and theories of a variety of disciplines, like women's studies, communications, and ethnic studies.

72. *See generally* Silbey & Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165 (1987).

All of the approaches to legal phenomena described here place an emphasis on the human aspects of law-making, interpretation, and enforcement, and seek to understand where the patterns and "social facts" are located. With the exception of law and economics, they share an understanding that no one system of thought can totally explain legal phenomena, and that the method and object of study may vary and thus provide a variety of insights.

They also share, to varying degrees, marginalization within the legal academy, if not in the parent disciplines that spawned them. As I will explore more fully below, I also believe these efforts to understand the "social" and "experiential" aspects of law are all "critical," to use Trubek's words, in part because they are all marginalized, but also because they offer a political critique of legal formalism and doctrinalism.

The ways in which these intellectual movements open the legal text and explore other dimensions of legal behavior is political in two senses. First, by challenging the politics of legal formalism, each of these movements exposes the "academic myth"—that there is some legal truth to be found in the text of the law—and causes us to look behind the law—to its makers and interpreters—to understand how it really operates. This is the "academic" or "intellectual" political project. Second, many of these intellectual movements have some connection to a social or political movement outside the legal academy. In some cases, the intellectual movement may have preceded its real world counterpart (i.e., American pragmatism and legal realism preceded New Deal reformism). In other cases, social movements preceded theory making (civil rights, feminism)⁷³ or came together at the same time (clinical education is a product both of the anti-poverty movement of the 1960's and the educational reforms of the same era calling for "relevance" to social problems in the academy).⁷⁴ All of these intellectual developments are situated in a particular time and place in their relationships to events occurring both in and out of the academy.

The perspective I share with Trubek is that all of these movements, socio-legal studies in particular, need to be conscious of being in both

73. For rich discussion of the interplay between theory and practice in social movements, see Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L. REV. 589 (1986). Some, including Schneider, would say that theory and social movements inform each other and exist contemporaneously in times of social struggle. See generally J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

74. In my view this "movement" has been transformed into an instrumental educational project for learning lawyering skills, thus becoming increasingly detached from its political roots, but that is a subject for another essay.

the intellectual and real world arenas. The movements need to have "Durkheimian epiphanies" and self-consciousness about themselves because the production of knowledge has political implications. For this reason I now turn to some of the epistemological and political questions implicated in the "law and society idea," both as a research project and as a program of legal education.

III. "IF DURKHEIM WERE A WOMAN": SOME THOUGHTS ON THE SOCIOLOGY OF KNOWLEDGE

When Durkheim did his studies of suicide, social science was trying to emulate the methods and practice of natural science. In the nineteenth century, law too was considered a "science"—with neutral, objective, and universal principles. In law, the "scientific method" idea never worked as well. Teasing principles out of cases was not quite the same as conducting experiments or collecting social data. Yet, as Trubek points out, a commitment still exists in many circles that some "objective" knowable truth is out "there." The knowable consists of a moral order—or in constitutional jargon, "fundamental interests"—that can be discerned without bias and that are important to us all. Even when legal realism demonstrated some of the failure of this conception, social or policy science was seen as yet another way of reclaiming objectivity by the search for real-world truth to supplement the law.⁷⁵

In Trubek's analysis, post-Realist lawyers who engaged in what he calls "Imperial Law" combined a faith in the power and centrality of law (as more fully developed to include a sort of crude "social science *cum* policy science") with a renewed commitment to law as a "neutral" force in society. They did this by serving as a mediating force between what we think of as civil society, the state, and competing interest groups. In this view, social science was necessary from an instrumentalist perspective to effectuate the goals of law in a more activist state. In fact, as Trubek points out, this tale must necessarily be more complicated—because if the Realists were New Deal legal activists and the post-Realist lawyers were 1960's legal activists, their use of law and social science could hardly be called neutral. Each of these periods of lawmaking was characterized by commitments to particular values and goals—values and goals that were, in the examples of Social Security and civil rights, significant departures from prior values and policies.

75. See generally Trubek, *supra* note 2; Peller, *supra* note 53.

Trubek describes several "ideal types" of social scientists engaged in the study of law—the True Scientist, the Social Problem Solver, and the Technician—and describes several types of lawyers—the Imperial Jurists and the Skeptical Pragmatists. Trubek calls this relationship of law and social science a "marriage of convenience" in which lawyers sought the certainty from social science they could not achieve through doctrine, and social scientists sought access to power. In another interesting turn of phrase, Trubek says "like royal mistresses in earlier times, social scientists may have thought that by an alliance with law they could exercise power behind the scenes."⁷⁶ I want to deconstruct a number of these ideas from a feminist perspective to question some of the meanings that may lie within this text. My comments here are directed both to Trubek's particular formulations of the issues and also to the larger epistemological issues they raise.

First, the "marriage of convenience" described by Trubek seems to encode a conventional conception of marriage, in which one partner (in this case the more "male" law) dominates the other (the more "female" social science). Trubek tells a tale of social science in service to law—note the "mistress" language. This further encodes a hierarchy of fields—or at least a duality between them—gendered in the use of Trubek's metaphors, that I think misconceives (no pun intended!) the intentions of at least some parties to this relationship who saw it as "transcending" disciplines to form a new field⁷⁷ of inquiry.⁷⁸

What I do share with Trubek is a sense that both fields, separately and together, however bound to form a "family," share some common assumptions about how knowledge is acquired, structured, and distributed.⁷⁹ The quest for certainty, neutrality, and objectivity that characterized both law and social science (and certainly the hybrid "policy science" that funded much of the early work) has been brought seriously to account in recent years, not only by recent work in feminist epistemology,⁸⁰ but also by similar challenges to received

76. See Trubek, *supra* note 2, at 26 n.50.

77. This story of transdisciplinary work is more consistent with the story of the Law and Society movement told in Felice Levine's Presidential Address, *supra* note 1.

78. In the comment period following the Mason Ladd lecture on which these articles are based, Trubek responded to these comments by suggesting that law and social science be granted a divorce, with joint custody of the truth. While I criticize the marriage metaphor, I do not think law and social science should be "divorced," and in my view they will have to share custody of the truth with a number of other fields of study as elaborated in the text.

79. I have purposely avoided the use of the word "disseminated" here to put an end to these inappropriately gendered metaphors.

80. See, e.g., *FEMINIST RESEARCH METHODS: EXEMPLARY READINGS IN THE SOCIAL SCIENCES* (J. Nielsen ed. 1990); S. HARDING, *FEMINISM AND METHODOLOGY: SOCIAL SCIENCE ISSUES* (1987) [hereinafter *METHODOLOGY*]; S. HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) [hereinafter *SCIENCE QUESTION*].

knowledge in virtually all of the major disciplines in the twentieth century. These changes are inspired in part by the great critical theories of our time—modernism, structuralism, deconstructionism, post-structuralism, and post-modernism.⁸¹ In literature, canonicity has been challenged;⁸² in history, periodicity has been challenged.⁸³ Even in science, objectivity and neutrality have been challenged⁸⁴ by those who have argued that the relationship of the scientist to the object of study is not as distanced or neutral as our romanticization of the scientific method would have it appear.

In short, scientists of all disciplines are rooted in their own times and spaces, with given genders, races, ethnicities, politics, and personal histories—or, these days, “personal narratives.” These characteristics and experiences of the scientists affect the choices of subject for study, the methods of conducting the studies, and the methodology (or theory) of research.

To return for a moment to Durkheim, these observations about how knowledge is socially constructed ask us to consider the extent to which the social patterns we see in the data are the products of who we are and what we want to see. I chose Durkheim’s study of suicide because I think it demonstrates the ability to glimpse a “transcended” knowledge. His story of women’s experience of family life is remarkably acute (and I might add, feminist!), and knowledge is not limited entirely to a shared experience of the studied.⁸⁵ Yet, in looking at the work of another sociologist, Talcott Parsons,⁸⁶ and the structuralist-functional school in general, we now see that the pattern variables that assigned instrumental roles to men and affective roles to women were the product both of a conservative view of society and perhaps a justification or defense of the status quo of the 1950’s and 1960’s in which the work was written. Trubek illustrates well how this same

81. For some basic introductions to these theories, see E. KURZWEIL, *THE AGE OF STRUCTURALISM: LEVI-STRAUSS TO FOUCAULT* (1980); T. EAGLETON, *supra* note 59; Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 *SIGNS* 621 (1987); Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 *SIGNS* 533 (1989).

82. A. KRUPAT, *THE VOICE IN THE MARGIN: NATIVE AMERICAN LITERATURE AND THE CANON* (1989).

83. Kelly-Gadol, *Did Women Have a Renaissance?*, in *BECOMING VISIBLE: WOMEN IN EUROPEAN HISTORY* 137 (1977); J.W. SCOTT, *GENDER AND THE POLITICS OF HISTORY* (1988).

84. See generally R. BLIER, *SCIENCE AND GENDER: A CRITIQUE OF BIOLOGY AND ITS THEORIES ON WOMEN* (1984); SCIENCE QUESTION, *supra* note 80; E. F. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* (1985).

85. For a sensitive critique of the dangers of overtly gendered research methods, see Peplau & Conrad, *Beyond Nonsexist Research: The Perils of Feminist Methods in Psychology*, 13 *PSYCHOLOGY OF WOMEN Q.* 379 (1989).

86. T. PARSONS & E. SHILS, *TOWARD A GENERAL THEORY OF ACTION* (1951); T. PARSONS, *THE SOCIAL SYSTEM* (1951).

school operated to justify a totalizing theory of systematicity for the entire social system, including the legal domain, by focusing on pattern maintenance and the preservation of the social system.⁸⁷ Like feminist epistemologists who have linked the study of particular science questions to male gender,⁸⁸ or literary theorists who have linked the study of particular texts⁸⁹ to particular male interests,⁹⁰ Trubek links the early social science studies of law to the particular interests of those conducting the work—legitimacy, access to government, policy, and funding.

In my view, one of the major intellectual contributions of the twentieth century is the parallel development in a wide variety of fields of the recognition that social life cannot be detached from social study or science, and that our knowledge is all socially constructed and validated. Thus, as in other disciplines, we in law and social science have learned that law does not permit, in Trubek's words, a "univocal" understanding of universal moral imperatives, and social science cannot give us an objective description of the social institutions in which law is made and enforced.⁹¹

To take seriously the claims of feminist epistemologists and others working on modern critiques of the theory of knowledge, we need to acknowledge the relationship of the researcher to the subject (whether "engaged" or distanced).⁹² Additionally, we must consider the selection of research questions and framing of issues, the role of personal experience as "truth,"⁹³ the partiality or perspectivity of truth,⁹⁴ the

87. Trubek, *supra* note 2, at 31-33.

88. See generally E.F. KELLER, *supra* note 84.

89. In academic circles these are called the DWEM texts—Dead White European Male texts.

90. See generally C. HEILBRUN, *WRITING A WOMAN'S LIFE* (1988); Heilbrun & Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 (1990).

91. For an argument about the relatively timeless validity of some "objective" social truths, despite recent meta-theoretical critiques of social science, see Collins, *Sociology: Proscience or Antiscience?*, 54 AM. SOC. REV. 124 (1989).

92. For an interesting discussion of how problematic "engaged" feminist ethnomethodology may become, see Stacey, *Can There Be A Feminist Ethnography?*, 11 WOMEN'S STUD. INT'L F. 21 (1988).

93. This particular form of feminist knowing—based in part on consciousness raising—while "empirical" in the experiential sense, raises issues of validation. See C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 102 (1989); Bartlett, *supra* note 70, at 864.

94. Feminist theorists have learned well the lesson of creating theories out of situated experiences. Much feminist theory is embedded in white middle class experience. See generally C. STEEDMAN, *LANDSCAPE FOR A GOOD WOMAN: A STORY OF TWO LIVES* (1987) (exposing the class bias in much feminist thought); E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Collins, *The Social Construction of Black Feminist Thought*, 14 SIGNS 745 (1989) (Spelman and Collins review both the absence and contributions of the black feminist perspective.); Minow, *Beyond Universality*, 1989 U. CHI. L. F. 115 [hereinafter *Univer-*

use of language and metaphor in our descriptions of what we know,⁹⁵ and skepticism about whether methods of validation are possible in a post-modern world. These concerns have led to the identification of three analytic feminist epistemological positions—feminist empiricism (knowing from observations of experience, corrected for misogynist bias),⁹⁶ feminist standpoint (knowing derived from oppressed or excluded status that is superior to top-down knowledge), or post-modern epistemology (skepticism about whether any truth or unitary system of validation is possible).⁹⁷

For me, the contribution of feminist epistemology and similar claims derived from critical race theory⁹⁸ is the exposure at the level of ideas and theory of what exclusion means. This is in addition to the substantive claims about exclusion from being the known or becoming a knower and the inaccuracies in our knowledge that such exclusions present. Thus, particular exclusions are both real (in that particular subjects and objects of research are excluded) and ideal (in the sense that they reveal the incompleteness and inaccuracy of our paradigms and offer the possibility of new ones).⁹⁹

At the "ideal" or meta-level, such epistemological critiques of science and social science remind us to view our research and our "Durkheimian epiphanies" with some skepticism. In what political commitments or engagements is our work rooted? What has been left out? How would other researchers look at the questions and at the answers? At the same time, and most important for present purposes, feminist epistemology does acknowledge its rootedness in particular political issues. Feminism as an academic subject of inquiry emerged at a particular point to address particular issues, both in the world and in academe. In that sense it unabashedly—if still somewhat prob-

sality]; Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988) (Minow suggests in both articles that feminists try to avoid the universal generalizations of masculinist thought.).

95. Consider the polarized binary oppositions set up in most scientific inquiry. Notice the use of competition and sports metaphors in such subjects as evolution and cell biology, such as "survival of the fittest," "winning the battle for survival," and "achieving the biological goal." E. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* (1985).

96. See generally M. EICHLER, *NON-SEXIST RESEARCH METHODS* (1988).

97. These different perspectives are elaborated more completely in *METHODOLOGY*, *supra* note 80; Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405 (1988); Bartlett, *supra* note 70; Harding, *The Instability of the Analytic Categories of Feminist Theory*, 11 SIGNS 645 (1986); Hawkesworth, *supra* note 81; and Hekman, *Comment on Hawkesworth's "Knowers, Knowing, Known: Feminist Theory and Claims of Truth"*, 15 SIGNS 417 (1990).

98. See generally HARDING, *SCIENCE FOR THE FEW? NEW FEMINIST ISSUES* (forthcoming, Cornell U. Press, 1991), and Crenshaw, *supra* note 3.

99. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

lematically—confronts its engagement with particular social issues to study¹⁰⁰ and its more complicated theoretical project of determining if there really is a “women’s way of knowing.”¹⁰¹ Despite Trubek’s labeling of feminism’s contribution to socio-legal studies as a “systematic” and structural account of law as a patriarchal system, I think one of the more significant contributions of feminist legal theory to socio-legal studies has been the feminist elaboration of partiality, positionality,¹⁰² and political constructions of knowledge. This is a perspective which socio-legal studies would do well to listen to, particularly in the current debates between positivism and interpretivism in the parent disciplines of social science.¹⁰³

IV. WHAT IS TO BE DONE? RECOGNIZING THE ENGAGEMENT OF SOCIO-LEGAL STUDIES IN RESEARCH AND LEGAL EDUCATION

Trubek comes out of the other end of his critique of socio-legal studies by suggesting that our original understandings of the “law and society” idea no longer hold. I do not share completely his revision of the past because, as I have said, I think it has gone back to the past with the future in mind, criticizing early developments from a particular perspective in the present. Nevertheless, we share enough of a vision about the future, in a post-modern reconstruction of socio-legal studies, that I hope we both come out of this discussion encouraging, not dampening, this important form of social inquiry about law. I would here like to briefly suggest some implications for socio-legal research and legal education.

100. Consider, for example, the feminist concerns about the impact of divorce in L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES ON WOMEN AND CHILDREN IN AMERICA* (1985), and the gender issues in child custody in Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

101. See generally M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN’S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* (1986); C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

102. This is Katherine Bartlett’s phrase. Bartlett, *supra* note 70, at 832.

103. Some of these issues were confronted in a plenary session at the twenty-fifth anniversary meeting of the Law & Society Association in Madison, Wisconsin, in June 1989.

Feminist critiques of dominant epistemologies are not the only forms of critiques, and feminist critiques have their own many forms. See Collins, *supra* note 94. The irony of most critical discussions of the “new” epistemology, however, is that while they claim to be based on particular experiences (particularly in their “standpoint” forms), the arguments for them are still constructed in abstract language that make claims about some general applicability. The next stage in the epistemological discussion will have to take up how conflicting “experiences”—or at least non-additive experiences—can be validated and used to construct some knowledge base with applicability and relevance to more than the “experiencing” group. This also requires a critical look at the essentialism embedded in many of the standpoint epistemologies.

Trubek suggests that with our "new" understandings of the "fragility" of law we will be less chauvinistic in our assumptions about how much law can accomplish. In a similar vein, we will see how much our normative visions are not unitary but multi-vocal and how diverse is our legal culture in interpreting those normative visions. At the same time, we will see the greater variety of places in which law is situated—from the streets of drug gangs to the corridors of the Supreme Court. And legal studies—including social scientific studies of the law—will be important points of struggle, both in the search for truth and in the battles of progressive politics.

In my view, none of these understandings are new, but all could easily be said to have informed the best of the early work in socio-legal studies. Socio-legal scholars have long recognized that the law is not self-executing, but rather often contradictory and dependent for implementation on human actors. Similarly, legal pluralists—principally, but not exclusively, legal anthropologists—have long recognized the multiplicity and "discursiveness" of law and law-related systems. And who, if not socio-legal scholars, took us to the many non-court sites of law in action? In short, I think the critique and vision of legal study that Trubek attacks and offers is better directed at conventional legal scholarship and education than at socio-legal studies. While socio-legal studies may need some reorienting as a result of recent developments in the theory of knowledge, socio-legal studies, in my view, always has paid some attention to the social construction of knowledge. Sociology's study of the sociology of knowledge has been, I believe, more self-critical and self-conscious than jurisprudence's study of the theory of law, at least until feminists and critical scholars recently entered the field. In my view, the more important "gap" study here is of how long it has taken traditional legal academic research and teaching to catch up with new epistemological and theoretical debates in other academic disciplines. Legal academe's resistance to socio-legal studies is just another example of its collective inability to understand the variability of human interaction around law and legal issues, and its effort to suppress other sources of understanding and knowledge.

If one of the things we learn about knowledge is that it is socially constructed, then added perspectives that facilitate our understanding of the impossibility of universalizing about law¹⁰⁴ should be welcomed. Socio-legal studies permit us the "Durkheimian epiphanies" that demonstrate the contextuality of our knowledge—suicide is not

104. See generally *Universality*, *supra* note 94.

the same "social fact" for men or women who are in families or who are alone. Rape is not the "same" experience for men and women, though the law seems to privilege one account over another.¹⁰⁵

All of the researchers I have mentioned here chose their subjects and methods with a purpose in mind. The ones I have highlighted have all had a "point of view" or "perspective" on their subject, and I believe all of them were "critical" in the small "c" sense of the term, in that they sought to upset or clarify misunderstandings we have had of our social and legal lives. I think that all socio-legal researchers have to confront the questions of what political uses will be made of their research.¹⁰⁶ They also must decide whether they are helping make the world a better place or reinforcing a deeply unjust present world. In light of current issues, this means—concretely in today's world—an examination of whether racist, sexist, or other biases haunt the work, whether exposure of injustice is possible and remediable with the limited tools we have, whether the law is "imperial" in its force, and whether other forms of social action can be employed for progressive social change. This is clearly a "political" agenda. But I believe that all social inquiry is "political" in that choices are made about what to study and how to study. We cannot always control how our work is used,¹⁰⁷ but we can try to study those things that matter and conduct our studies in a manner that treats those studied as the human beings they are. In my view, all of the "law and" movements have tried to come to grips with the politics of law—with law seen as both an oppressive force and as an aspiration of human morality.

Modern socio-legal scholars who take this aspect of their work seriously self-consciously choose what they study and how they study it from this perspective. As examples, I think of the work in feminist criminology by Kathleen Daly,¹⁰⁸ the spate of work on divorce re-

105. See generally S. ESTRICH, *REAL RAPE* (1987); C. MACKINNON, *supra* note 93.

106. In my view, many early socio-legal researchers actually became more political as a result of their research, when they saw it commissioned and sometimes misused by the government. This was among the reactions to the reports of the Kerner Commission on Violence (REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)) and the Meese Commission on Pornography (UNITED STATES ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (1986)). See generally *Symposium on the Attorney General's Commission on Pornography*, 1987 AM. B. FOUND. RES. J. 641.

107. My own work on legal services lawyers' resource allocation decisions was conducted at a time when Reagan administration officials were seeking data to justify closing down the program. See Menkel-Meadow & Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL'Y Q. 237 (1983).

108. Daly & Chesney-Lind, *Feminism and Criminology*, 5 JUSTICE Q. 497 (1988); Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice*, 17 INT'L J. SOC. L. 1 (1989).

form,¹⁰⁹ empirical and theoretical work on racism, discrimination, and other forms of racial injustice, Richard Abel's new work¹¹⁰ on the role of legality in the struggle against apartheid, and continued work on the role of legality in poverty. These are studies that seek to look at law's role in maintaining or ameliorating injustice. The scholars conducting this work are not "neutral" about their subjects. They care deeply about the outcomes, but that does not compromise their "science." In my view, they are "engaged" with their science, as opposed to distanced from their science. Other versions of this work include the "corrective" law and social science studies by those researchers who seek to fill the gaps of our knowledge that have been created by myopic, sexist, or racist research. This is done by reconstructing definitions (such as rape), by adding female or other excluded subjects to the study of moral or legal reasoning and behavior,¹¹¹ and by seeking to develop or redefine new categories of analysis to expose the political underpinnings of our work (such as the work on ideology by the Amherst Seminar).¹¹²

Trubek speaks of a recent movement toward the study of the theory of practice as one of the "new" perspectives on law with which socio-legal studies might engage.¹¹³ It is here that I think socio-legal studies needs to make its greater claims. For our scholarship does no good if it is not linked to those who will actually work with law. Thus, our moments of "Durkheimian epiphanies" must find their way into law teaching and practice. Donald Schon has demonstrated that professional knowledge and judgment are "learned" in moments of engagement in experience that represent the practice equivalent of "Durkheimian epiphanies." Empirical insights about how law is practiced, enforced, or ignored are essential to what we teach in law schools. Thus, Schon argues the professional school should be a place for a "reflective practicum" that combines discipline-based knowledge with practical application.¹¹⁴ Law students know first hand about the stratification of the bar, and lawyers know first hand about the

109. See, e.g., H. JACOB, *SILENT REVOLUTION, THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); L. WEITZMAN, *supra* note 100; Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Reform in New York State*, 37 BUFFALO L. REV. 375 (1988-89).

110. R. Abel, *The Role of Legality in the Struggle Against Apartheid*, a proposal submitted to the National Science Foundation, Law and Social Science Program (1990).

111. See generally C. GILLIGAN, *supra* note 101; *Gender and Socio-legal Studies*, 25 LAW & SOC'Y REV. (special issue, forthcoming, 1991).

112. See Trubek & Esser, *supra* note 20, at 6.

113. See generally Coombe, *Room for Maneuver: Toward A Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69 (1989).

114. EDUCATING, *supra* note 4, at 306-07.

variations in judicial and legal practices. As William Simon has noted, most lawyers will learn more of use to them from Laurence Ross' empirical study of the personal injury claims process¹¹⁵ than from treatises on the development of doctrine.¹¹⁶ I have never understood why the cumulative knowledge of socio-legal studies has remained so absent from law school classrooms, including those of the clinics. Thus, for me there is a politics of education, as well as of scholarship, and both of these require greater engagement with the particular issues that confront us today. So, for example, our students need to understand the realities of the lower courts they will practice in more than the doctrines developed in the Supreme Court. Research on juries and fact-finding should inform our teaching about case presentation and trials.¹¹⁷ The vast research on dispute processing in the field of socio-legal studies¹¹⁸ should inform the classroom discussions in procedure and clinical courses in order to place decisions about litigation choices in the more complex reality in which they are actually located for clients and practicing lawyers.

Of course, social science can be misused in practical law, too. Social science research firms in the private sector provide mock jury analysis of how cases should be presented that may lead to the manipulation of case presentation and distortions of the "truth." Thus, in my view, the political and ethical questions must be asked for educational purposes as well—what are the ends to which social science is being directed in law practice? This is the social science *in* law, not the social science *of* law.¹¹⁹

If we could go "back to the future," I would try to rewrite the fate of socio-legal studies, not so much from the perspective of scholarship, but from the perspective of legal education. The law operates through human beings. Some forms of socio-legal studies attempt to illuminate the patterns with which human actors use the law, and it seems to me that engagement with the reality of law that characterizes the best socio-legal studies would lead to deeper "Durkheimian epiphanies" for our students; as well as for ourselves. For in order to change things, we need to know how things "are."

115. H.L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (2d. ed. 1980).

116. See Friedman, *supra* note 2, at 778.

117. My colleague Al Moore has attempted this application of psychology and law to trial advocacy teaching. See generally Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989).

118. See generally *Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. (special issue) (1980-81).

119. See generally Friedman, *supra* note 2.

